1988

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Recommended Citation

Sarah N. Welling & Barbara W. Jones, *Prison Reform Issues for the Eighties: Modification and Dissolution of Injunctions in the Federal Courts*, 20 Conn. L. Rev. 865 (1988).

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Notes/Citation Information
Connecticut Law Review, Vol. 20, No. 4 (Summer 1988), pp. 865-894

PRISON REFORM ISSUES FOR THE EIGHTIES: MODIFICATION AND DISSOLUTION OF INJUNCTIONS IN THE FEDERAL COURTS

by Sarah N. Welling and Barbara W. Jones***

During the past two decades, federal courts have become involved in the supervision of state and local prison systems. This supervisory role is the result of a new type of litigation, the institutional reform lawsuit.[1] These lawsuits originate when prisoners sue state or local prison administrators, alleging unconstitutional conditions of confinement. Plaintiffs usually seek a permanent injunction outlining a plan to eliminate the offending conditions. If an injunction is granted, the court will retain jurisdiction after it is entered to monitor compliance. Often this implementation phase lasts for years.

The majority of prison reform lawsuits were filed in the 1960's and 1970's.[2] Early prison reform litigation focused on the definition of substantive rights,[3] the appropriate extent of injunctive

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1. Institutional reform lawsuits protect rights by defining and implementing changes in the operation of complex social institutions. *See generally* Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Special Project, *The Remedial Process in Institutional Reform Litigation*, 78 COLUM. L. REV. 784 (1978); Note, *The Modification of Consent Decrees in Institutional Reform Litigation*, 99 HARV. L. REV. 1020 (1986). This article examines the complex social institutions of state and local prison systems.

2. *See, e.g.*, *infra* notes 3-4; *see also* Jost, *From* Swift *to* Stotts *and Beyond: Modification of Injunctions in the Federal Courts*, 64 TEX. L. REV. 1101, 1106 (1986) (the 1960's and 1970's were "the heyday of equity in the federal courts").

3. *See, e.g.*, Wolff v. McDonnell, 418 U.S. 539 (1974) (disciplinary procedures); Procunier v. Martinez, 416 U.S. 396 (1974) (mail censorship regulations); Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976) (overcrowding), *aff'd as modified sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *cert. denied*, 438 U.S. 915 (1978); Newman v. Alabama, 349 F. Supp. 278 (M.D. Ala. 1972) (medical treatment), *aff'd in part*, 503 F.2d 1320 (5th Cir. 1974), *cert. denied.*, 421 U.S. 948 (1975); Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970) (forced, uncompensated farm labor; prison conditions; and racial segregation), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

relief,[4] and the role of the courts in administering relief.[5] As prison litigation matured, the normal evolution of these lawsuits led to new questions taking center stage in the 1980's, questions of injunction, modification, and dissolution.

Modification has been discussed frequently by both courts and commentators. Dissolution, in contrast, has been the focus of relatively little attention. This article begins with a summary examination of prison reform litigation, and then analyzes the standards for modification and dissolution of injunctions. The article concludes that in spite of some ambiguous decisions and some references to a new, more flexible modification standard, courts in prison reform cases are actually applying the strict standard formulated by the Supreme Court in *United States v. Swift & Co.*[6] In addition, courts are uncertain whether to use different modification standards for consent decrees and litigated injunctions. The courts that have distinguished the two types of orders disagee on the impact of the distinction. This article stresses that the best approach is not to distinguish consent decrees and litigated injunctions, but rather to apply the strict modification standard to both types of orders.

As for dissolution, courts agree that the critical factor is that there be no risk of noncompliance in the future. In assessing the risk of future noncompliance, courts have identified several relevant factors but have overlooked the educational impact of prison reform decisions. The dissolution standard is good and the few cases decided indicate that the courts are applying it conscientiously. However, the potential exists for the courts to succumb to intuitive reluctance to dissolving injunctions. Courts should resist this temptation and dissolve injunctions if the dissolution standard is met. The article finally concludes that a stringent standard for injunctive modification, in combination with the current standard for dissolution, will provide the necessary institutional reform.

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4. *See, e.g.*, Bell v. Wolfish, 441 U.S. 520 (1979) (enjoinment); Rizzo v. Goode, 423 U.S. 362 (1976) (order overhauling police disciplinary procedures exceeded authority); Kendrick v. Bland, 740 F.2d 432 (6th Cir. 1984) (enjoinment from performing certain responsibilities inappropriate where defendants exhibited a history of good faith cooperation); Hoptowit v. Ray, 682 F.2d 1237, 1246 (9th Cir. 1982) ("Federal courts lack the power to interfere with decisions made by state prison officials, absent constitutional violations."); Ruiz v. Estelle, 679 F.2d 1115 (5th Cir. 1982) (discretion in tailoring a remedial injunction is not unconfined), *cert. denied*, 460 U.S. 1042 (1983).

5. *See supra* note 4.

6. 286 U.S. 106 (1932).

I. BACKGROUND: A PRIMER ON PRISON REFORM LITIGATION

Prison reform litigation usually begins when inmates sue state or local prison administrators, alleging that the confinement conditions are unconstitutional, either as cruel and unusual punishment or as a denial of due process.[7] Early cases challenging prison conditions determined that the conditions violated the eighth amendment's prohibition against cruel and unusual punishment and, therefore, warranted judicial intrusion upon state administration of the prison.[8] Later, courts decided that additional protections in the Bill of Rights applied to incarcerated felons to a limited extent.[9]

Although remedies for prison conditions lawsuits include damages,[10] plaintiffs usually seek a permanent injunction.[11] These injunctions have been called "structural" because they "restructure the organization to eliminate a threat to [constitutional] values posed by the present institutional arrangements"[12] and are "the means by which these reconstructive directives are transmitted."[13] Structural injunc-

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7. *See, e.g.*, Ruiz v. Lynaugh, 811 F.2d 856 (5th Cir. 1987) (per curiam) (suit brought by inmates of the Texas Department of Corrections); Battle v. Anderson, 708 F.2d 1523 (10th Cir. 1983) (prison inmate filing pro se), *cert. dismissed*, 465 U.S. 1014 (1984); Battle v. Anderson, 564 F.2d 388 (10th Cir. 1977) (prison inmate filing pro se); Ramos v. Lamm, 485 F. Supp. 122 (D. Colo. 1979) (inmates brought suit naming the governor of Colorado, the executive director of the Department of Corrections, and the superintendent of the maximum security unit as defendants), *aff'd in part and remanded*, 639 F.2d 559 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); Johnson v. Levine, 450 F. Supp. 648 (D. Md. 1978) (class action brought by state prisoners), *modified*, 588 F.2d 1378 (4th Cir. 1978). Inmates have challenged the adequacy of living space, *see, e.g., Ruiz*, 811 F.2d 856; food, exercise, lawbooks, security, visitation, *see, e.g.*, Duran v. Elrod, 760 F.2d 756 (7th Cir. 1985); and medical services, *see, e.g.*, Estelle v. Gamble, 429 U.S. 97 (1976), *reh'g denied*, 429 U.S. 1066 (1977). In evaluating these claims, courts have examined the totality of the circumstances rather than isolated factors. Rhodes v. Chapman, 452 U.S. 337, 363 n.10 (1981) (Brennan, J., concurring) ("The Court today adopts the totality-of-the-circumstances test.").

8. *See, e.g., Estelle*, 429 U.S. 97 (deliberate indifference to serious medical need).

9. *See, e.g.*, Bounds v. Smith, 430 U.S. 817 (1977) (right of access to the courts); Wolff v. McDonnell, 418 U.S. 539 (1974) (due process as applied to disciplinary proceedings); Procunier v. Martinez, 416 U.S. 396 (1974) (free speech as applied to censorship of mail); Cruz v. Beto, 405 U.S. 319 (1972) (per curiam) (religion); Johnson v. Avery, 393 U.S. 483 (1969) (no absolute ban on prisoners assisting each other with habeas corpus suits).

10. *See, e.g.*, Smith v. Wade, 461 U.S. 30 (1983) (punitive damages available to inmates under 42 U.S.C. § 1983); Landman v. Royster, 354 F. Supp. 1302, 1318-19 (E.D. Va. 1973) (compensatory damages allowed for "psychic damages and suffering").

11. *See* Special Project, *supra* note 1, at 813.

12. Fiss, *The Supreme Court 1978 Term, Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 2 (1979). *See generally* O. FISS, INJUNCTIONS 1, 415-17 (1972); Jost, *supra* note 2; Note, *supra* note 1.

13. Fiss, *supra* note 12, at 2.

tions have been entered to limit punitive isolation,[14] enjoin poor sanitation[15] and overcrowding,[16] and mandate adequate medical care.[17] Usually the injunctions are very detailed.

Injunctions in prison reform lawsuits can be entered in two ways. One alternative is litigation, which allows the judge to define the terms of the injunction. The other alternative is for the parties to settle the lawsuit and negotiate the terms of an injunction, which must then be approved by the court.[18] These negotiated injunctions, or consent decrees, are court orders embodying the parties' negotiated resolution of the litigation.[19]

Aside from the procedural difference in the way litigated injunctions and consent decrees are derived, other distinctions exist. First, consent decrees usually give the plaintiff more relief than the law provides,[20] while litigated decrees can only give the plaintiff the minimum required by the law.[21] Second, consent decrees generally lack the clear purpose of litigated decrees,[22] so interpretational problems arise when a court attempts to facilitate the decree's purpose.[23] Third, the terms of a litigated injunction are interpreted through principles of equity,[24] but a consent decree is a hybrid—a contract and a judgment[25]—so its terms

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14. *See, e.g.*, Hutto v. Finney, 437 U.S. 678 (1978), *reh'g denied*, 439 U.S. 1122 (1979).

15. *See, e.g.*, Adams v. Mathis, 458 F. Supp. 302 (M.D. Ala. 1978), *aff'd*, 614 F.2d 42 (5th Cir. 1980).

16. *Id.*

17. *Id.*

18. Once a suit is filed, the court must approve any consent decree. *See, e.g.*, United States v. Armour & Co., 402 U.S. 673 (1971); System Fed'n No. 91 v. Wright, 364 U.S. 642 (1961). Moreover, many prison reform suits are litigated as class actions, and Federal Rule of Civil Procedure 23(e) requires court approval of any settlement involving a class. FED. R. CIV. P. 23(E).

19. Anderson, *The Approval and Interpretation of Consent Decrees in Civil Rights Class Action Litigation*, 1983 U. ILL. L. REV. 579, 584; *see also* Note, *supra* note 1, at 1020 n.2 ("A consent decree is a compromise reached by two parties that is approved by a judge. It is thus a hybrid of a judicial order and a private contract. The parties themselves fix the terms of a consent decree, typically after lengthy negotiations, and a judge adds his signature to the pact.") An example of a consent decree is attached as an appendix to Kendrick v. Bland, 541 F. Supp. 21 (W.D. Ky. 1981).

20. *See System Fed'n*, 364 U.S. 642; Duran v. Elrod, 760 F.2d 756, 760 (7th Cir. 1985); Note, *supra* note 1, at 1027 n.41.

21. *See* Pennhust State School & Hosp. v. Halderman, 465 U.S. 89 (1984); Washington v. Penwell, 700 F.2d 570, 573 (9th Cir. 1983); *see also supra* note 4.

22. *See* United States v. American Cyanamid Co., 719 F.2d 558, 563 (2d Cir. 1983), *cert. denied*, 465 U.S. 1101 (1984); *Penwell*, 700 F.2d at 575; *see also* Jost, *supra* note 2, at 1144.

23. *See infra* note 118 for a discussion of the significance of interpreting the decree's purpose.

24. *System Fed'n*, 364 U.S. 642; United States v. Swift & Co., 286 U.S. 106 (1932).

25. United States v. ITT Continental Baking Co., 420 U.S. 223, 236-37 n.10 (1975); *see* Anderson, *supra* note 19, at 584-86; Jost, *supra* note 2, at 1103; *see also supra* note 19 and

are interpreted primarily through contract law and and then by resort to principles of equity.[26] Finally, some courts and commentators suggest that consent decrees should be more difficult to modify than litigated injunctions.[27]

Consent decrees are used frequently in prison reform litigation,[28] and have been more popular than litigated injunctions[29] for several reasons. A consent decree allows structural change to be made relatively quickly, rather than awaiting the end of litigation.[30] The defendants' attitude toward compliance may be better with a consent decree than a coercive judicial decree.[31] A consent decree may save public money and avoid the risk of publicity from an adverse civil rights judgment.[32] Settlement also saves judicial resources.[33] Finally, the parties can achieve more individualized relief when they negotiate the terms of the decree because they are more familiar than the judge with all the nuances of the conflict.[34]

Consent decrees also have some drawbacks. In entering into a decree, the defendant state officials agree to changes that may not be constitutionally required. Increased concessions by the defendants require more extensive monitoring by the court. This monitoring can be more expensive than the cost of a litigated judgment with an order providing for only the minimum constitutional remedy. Moreover, the implementation phase can become so complex, based on the detailed terms in the consent decree, that more court time is absorbed than if the case had been litigated originally. Finally, a consent decree has drawbacks in that the defendant gives the plaintiffs contractual rights

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accompanying text.

26. *American Cyanamid*, 719 F.2d at 564; *Penwell*, 700 F.2d at 573.

27. Philadelphia Welfare Rights Org. v. Shapp, 602 F.2d 1114, 1120 (3d Cir. 1979), *cert. denied*, 444 U.S. 1026 (1980); *see* Jost, *supra* note 2, at 1129 n.173, 1162. The significance of this final distinction is considered in the discussion of modification. *See infra* notes 113-23 and accompanying text.

28. *See, e.g.*, Benjamin v. Malcolm, 564 F. Supp. 668 (S.D.N.Y. 1983). Federal courts are currently managing corrections systems under consent decrees in thirty-four states. 19 CORRECTIONS DIGEST No. 5, at 1 (Mar. 19, 1988).

29. *See* Anderson, *supra* note 19, at 580-82; Anderson, *Release and Resumption of Jurisdiction Over Consent Decrees in Structural Reform Litigation*, 42 U. MIAMI L. REV. 401, 402 (1987) [hereinafter Anderson, *Release and Resumption of Jurisdiction over Consent Decrees*] (consent decrees have become widely used over the last thirty years).

30. *See* Anderson, *supra* note 19, at 580-82.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

above the legal minimum and thereby relinquishes more control over the penal system.

Once the injunction is entered, either by consent or after trial, the implementation phase begins.[35] Implementation usually involves disputes over interpretation of terms and allegations of noncompliance. If a dispute over terms arises, the court will first interpret the decree to clarify the obligations of the parties.[36] Then, if allegations of noncompliance are made, the court has several enforcement options. The first step usually involves judicial threats,[37] sometimes coupled with a specific compliance order.[38] If noncompliance continues, the court may hold a party in civil contempt.[39] One important limitation on this enforcement option is that impossibility is a defense to a civil contempt citation.[40] If noncompliance continues, the more drastic enforcement powers of the court are to order a release of inmates[41] or to close a facility.[42] These measures are a last resort that courts are reluctant to use.[43]

II. DEFINING THE STANDARD FOR MODIFICATION OF INJUNCTIONS

Modification of structural injunctions in institutional reform lawsuits has recently received much attention from both courts[44] and com-

35. *Id.* at 583.

36. *See, e.g.*, United States v. Armour & Co., 402 U.S. 673 (1971); United States v. Atlantic Ref. Co., 360 U.S. 19 (1959); Hughes v. United States, 342 U.S. 353 (1952).

37. *See* Special Project, *supra* note 1, at 838 & n.449.

38. *See, e.g.*, Morris v. Travisono, 373 F. Supp. 177 (D.R.I. 1974) (court enjoined defendant from continued violations of original consent decree), *aff'd*, 509 F.2d 1358 (1st Cir. 1975).

39. *See, e.g.*, Newman v. Graddick, 740 F.2d 1513 (11th Cir. 1984); Gomes v. Moran, 605 F.2d 27 (1st Cir. 1979); Jordan v. Arnold, 472 F. Supp. 265 (M.D. Pa. 1979), *appeal dismissed*, 631 F.2d 725 (3d Cir. 1980); *see generally* Special Project, *supra* note 1, at 838-41.

40. United States v. Bryan, 339 U.S. 323, 330-31 (1950) (ordinarily, one charged with contempt makes a complete defense by proving that he is unable to comply); Maggio v. Zeitz, 333 U.S. 56, 72-77 (1947) (a contempt order should not issue if there is a present inability to comply); Brotherhood of Locomotive Firemen v. Bangor & A.R.R., 380 F.2d 570, 581 (D.C. Cir. 1967) (inability to comply is a defense in coercive contempt proceedings); *see generally* Special Project, *supra* note 1, at 839.

41. *See, e.g.*, *Newman*, 740 F.2d at 1520-22.

42. Inmates v. Eisenstadt, 360 F. Supp. 676, 689-91 (D. Mass. 1973), *aff'd*, 494 F.2d 1196 (1st Cir. 1974).

43. *See, e.g.*, *Newman*, 740 F.2d at 1521 (release of prisoners only required if state cannot continue confinement in constitutional facility).

44. *See, e.g.*, Ruiz v. Lynaugh, 811 F.2d 856 (5th Cir. 1987); Duran v. Elrod, 760 F.2d 756 (7th Cir. 1985); *Newman*, 740 F.2d 1513; Washington v. Penwell, 700 F.2d 570 (9th Cir. 1983); Gomes v. Moran, 605 F.2d 27 (1st Cir. 1979).

mentators.[45] This spate of attention is due to conflicting signals from the courts regarding the standard for granting modification.

A. *The Original Standard for Modification*

The original standard for modifying permanent injunctions was formulated and developed in four Supreme Court cases.[46] The leading case is *United States v. Swift & Co.*,[47] a Sherman Act antitrust action brought to dissolve a monopoly of five meat-packers. The parties entered into a consent decree in 1920 that enjoined the defendants from maintaining a monopoly and from engaging in, or continuing, any combination in restraint of commerce.[48] The decree explicitly defined prohibited conduct. A permanent injunction was ordered, and the court retained jurisdiction to enforce the order.[49]

Ten years later, the defendants petitioned the court to modify the consent decree to accommodate industry changes.[50] The language of the consent decree specifically granted the court the power to modify the decree,[51] but the Supreme Court noted that even if the authority to modify had not been included in the decree, principles of equity would permit modification.[52] It stated that this authority exists regardless of whether the injunction was entered subsequent to litigation or by consent, and that equity demands that a court order not become an instrument of wrong so that the original purpose is defeated.[53] The Court concluded:

> We are not framing a decree. We are asking ourselves whether anything has happened that will justify us now in

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45. *See, e.g.*, Jost, *supra* note 2; Steinberg, *SEC and Other Permanent Injunctions—Standards for Their Imposition, Modification and Dissolution*, 66 CORNELL L. REV. 27 (1980); Comment, *Judicial Modification of Consent Judgments in Institutional Reform Litigation*, 50 BROOKLYN L. REV. 657 (1984); Note, *supra* note 1.

46. Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984); Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976); System Fed'n No. 91 v. Wright, 364 U.S. 642 (1961); United States v. Swift & Co., 286 U.S. 106 (1932). A fifth Supreme Court case, United States v. United Shoe Mach. Corp., 391 U.S. 294 (1968), is discussed in text accompanying notes 114-16. For an extensive analysis of this line of cases, see Jost, *supra* note 2, at 1107-13, 1121-23, 1152-61; Steinberg, *supra* note 45, at 41-43, 47-50; Comment, *supra* note 45, at 671-73; Note, *supra* note 1, at 1022-26.

47. 286 U.S. 106 (1932).

48. *Id.* at 111.

49. *Id.*

50. *Id.* at 113-14.

51. *Id.* at 114.

52. *Id.*

53. *Id.* at 114-15.

> changing a decree. The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making. We are not at liberty to reverse under the guise of readjusting . . . . The inquiry for us is whether the changes are so important that dangers, once substantial, have become attenuated to a shadow . . . . Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned.[54]

Applying this standard, the Court held that modification was not warranted because there had not been a sufficient change in industry conditions.[55]

The next two Supreme Court cases involved modification of a permanent injunction based on a change in the underlying substantive law. In *System Federation No. 91 v. Wright*,[56] a consent decree was entered that enjoined a railroad and various labor unions from discriminating against any plaintiff. The decree referred to provisions established in the Railway Labor Act,[57] which at that time barred union shops. After the consent decree was entered, the Railway Labor Act was amended by Congress to permit union shops.[58] In response to the amendment, the unions moved for modification of the consent decree.[59] The modification was denied by the district court and the Sixth Circuit affirmed.[60]

The Supreme Court reversed, finding that the Railway Labor Act provided the basis for the consent decree and guided the formulation of its terms.[61] The Court determined that when Congress amended a substantive portion of the Act referred to in the consent decree, circumstances were so changed that the lower court was erroneous in denying modification.[62] Under the *Swift* analysis, the circumstances had so changed that the decree had become an instrument of wrong.[63] The Court stated that because the Railway Labor Act was the source of the

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54. *Id.* at 119.
55. *Id.* at 115-20.
56. 364 U.S. 642 (1961).
57. *Id.* at 644.
58. *Id.*
59. *Id.* at 644-45.
60. *Id.* at 645-46.
61. *Id.* at 652-53.
62. *Id.* at 648.
63. *Id.* at 650-51.

consent decree, "[t]he parties have no power to require of the court continuing enforcement of rights the statute no longer gives."[64]

In *Pasadena City Board of Education v. Spangler*,[65] the Supreme Court examined whether a change in the law effected through a judicial decision rather than a legislative amendment was sufficient to warrant modification. The district court had determined that the Pasadena schools were unconstitutionally segregated, and ordered the school board to devise and adopt a plan to redress the racial imbalance, including a provision prohibiting a majority of minority students from attending any one school.[66] The board devised such a plan, and the parties and court accepted it. Four years later, the school board moved to modify the "no majority" provision of the plan because it would require rearranging the school zones annually. The district court denied modification on the ground that in every year but the first one, the school board had failed to comply with the literal terms of the order. The Ninth Circuit affirmed the denial of modification.[67]

The Supreme Court reversed the court of appeals and held the denial of modification to be error.[68] After the trial court's decision in *Pasadena*, the Supreme Court had decided *Swann v. Charlotte-Mecklenburg Board of Education*,[69] which disapproved of precise racial balancing. *Swann* created a substantive conflict with the terms of the *Pasadena* desegregation plan, and the denial of modification was therefore an abuse of discretion.[70]

Firefighters Local Union No. 1784 v. Stotts[71] is the most recent Supreme Court decision on the authority of courts to modify consent decrees. In *Stotts* a consent decree had been entered to increase the hiring of minorities as fire fighters in Cincinnati. The city later proposed a layoff plan that had a discriminatory impact. Although the consent decree made no reference to layoff plans, the district court nonetheless enjoined use of the plan on the basis that it would undermine the purpose of the consent decree.[72]

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64. *Id.* at 651-52.
65. 427 U.S. 424 (1976).
66. *Id.* at 427-28.
67. *Id.* at 429.
68. *Id.* at 438-41.
69. 402 U.S. 1 (1971).
70. 427 U.S. at 433-35. *See also* United States v. Georgia Power Co., 634 F.2d 929, 934 (5th Cir. 1981) (modification allowed based on change in common law), *vacated sub nom.* Local Union No. 84, Int'l Bhd. of Elec. Workers v. United States, 456 U.S. 952 (1982).
71. 467 U.S. 561 (1984).
72. *Id.* at 567.

The Supreme Court found that the lower court had gone beyond the terms of the consent decree when it enjoined the layoff plan.[73] The injunction was not authorized by the consent decree, and it exceeded the decree's purposes. The Court reasoned that the injunction was essentially an unauthorized modification of the consent decree,[74] and courts cannot grant modification without consent of the parties or a showing of changed circumstances that satisfies the requirements of *Swift*. Here, neither condition was met, so the injunction was error.

These four cases indicate the Supreme Court's position with respect to modification of injunctions. If the underlying law, whether statutory or decisional, changes so as to render the injunction inconsistent with the law, modification should be granted. If no change of law has occurred, *Swift* sets the standard for determining when modification is available.[75] *Stotts* made no change in *Swift* but rather indicated its continued vitality.[76] The Supreme Court's adherence to *Swift* and its hostility to modification continues.[77]

B. *A Freer Standard for Modification in the Circuit Courts*

In contrast with the Supreme Court's attitude, several circuit courts have endorsed a more lenient standard for granting modification of consent decrees. The two leading cases articulating the new standard are institutional reform cases, but do not involve prisons. In 1979, the Third Circuit allowed modification of a consent decree in *Philadelphia Welfare Rights Organization v. Shapp*.[78] The court stated:

> Where an affirmative obligation is imposed by court order on the assumption that it is realistically achievable, the court finds that the defendants have made a good faith effort to achieve the object by the contemplated means, and the object nevertheless has not been fully achieved, clearly a court of equity has power to modify the injunction in the light of experience.[79]

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73. 467 U.S. at 573-75.

74. *Id.*

75. Furthermore, this standard is codified in FED. R. CIV. P. 60(B)(5), governing relief from judgments. United States v. City of Chicago, 663 F.2d 1354, 1359 n.16 (7th Cir. 1981), *cert denied sub nom.* Augustus v. United States, 107 S. Ct. 1291 (1987). *See generally* Comment, *supra* note 45, at 670 n.74.

76. Steinberg, *supra* note 45, at 43, 59.

77. Note, *supra* note 1, at 1022, 1031.

78. 602 F.2d 1114 (3d Cir. 1979).

79. *Id.* at 1120-21.

In 1983, the Second Circuit reached a similar conclusion in *New York State Association for Retarded Children v. Carey*,[80] allowing modification of a consent decree that required a public home for the mentally retarded to move patients to smaller community facilities. The city argued that the limited housing market made community placement facilities impossible. The court stated that "[i]t is well recognized that in institutional reform litigation such as this, judicially-imposed remedies must be open to adaptation when unforeseen obstacles present themselves . . . ."[81] *Shapp* and *Carey* were both decided before *Stotts*, therefore, their significance is diminished. Yet even after *Stotts* was decided, courts continue to cite these cases as leading precedents.[82]

C. *Prison Cases in the Circuit Courts: Basic Adherence to the Swift/Stotts Standard*

Although the Supreme Court has never defined the standards for modification specifically in the context of prison reform litigation, several circuit courts have addressed this issue. The early decisions apply the strict standards established in *Swift* and its progeny to the modification requests. For example, in *Mayberry v Maroney*,[83] the Third Circuit reversed the district court's grant of modification on the ground that the record showed no evidence of the "changed circumstances" required by *Swift*.[84] Similarly, in *Gomes v. Moran*,[85] the First Circuit endorsed a modification, but only because intervening judicial decisions rendered the decree inconsistent with the law.[86] The case thus fell within the *System Federated-Pasadena* change of law doctrine.

In contrast, some of the later circuit court prison reform decisions seem to endorse the more flexible approach to modification articulated in *Shapp* and *Carey*. In *Newman v. Graddick*,[87] the Eleventh Circuit stated that "modification can be considered when . . . significant time has passed and objectives have not been met, . . . continuance is no longer warranted, . . . [or] continuation would be inequitable."[88] The

80. 706 F.2d 956 (2d Cir.), *cert. denied*, 464 U.S. 915 (1983).
81. *Id.* at 969.
82. *See, e.g.*, Ruiz v. Lynaugh, 811 F.2d 856 (5th Cir. 1987) (per curiam); Duran v. Elrod, 760 F.2d 756 (7th Cir. 1985).
83. 558 F.2d 1159 (3d Cir. 1977).
84. *Id.* at 1163-64.
85. 605 F.2d 27 (1st Cir. 1979).
86. *Id.* at 30-31.
87. 740 F.2d 1513 (11th Cir. 1984).
88. *Id.* at 1520 (citations omitted).

court characterized the decree as provisional and tentative, stating that "[t]he question is whether conduct or conditions have changed that would justify modification."[89] Consequently, the court remanded the case for reconsideration of modification under these standards.[90]

In 1985, the Seventh Circuit recognized a flexible modification standard in *Duran v. Elrod*.[91] Relying on *Carey*, *Shapp*, and *Newman*, the court stated that "recent decisions have suggested that a more liberal standard than that laid down in *Swift* for exercising the power to modify . . . is appropriate in the case of decrees supervising public institutions . . . ."[92] The court held, however, that a choice between old and new modification standards was unnecessary because the district court's decision was error under either standard.[93]

Most recently, in *Ruiz v. Lynaugh*[94] the Fifth Circuit recognized the emergence of a "less demanding standard for modification of consent decrees . . . within the institutional reform arena."[95] The court defined the less demanding standard as an approach that permits modification even if the *Swift* requirements are not met. It stated that defendants who "establish some change in circumstance," who show that they have made a good faith effort to comply with the decree, and who request "a modification that does not frustrate the original and overall purpose(s) of the decree," meet the standard for modification.[96] However, as in *Duran*, the court held that a choice between old and new modification standards was unnecessary because the district court's decision was correct under either standard.[97] The emergence of this flexible approach to modification of injunctions is related to the unique characteristics of institutional reform lawsuits and the structural injunctions they generate. The courts have limited their endorsement of the more flexible standard to this type of case.[98]

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89. *Id.*

90. *Id.* at 1521.

91. 760 F.2d 756 (7th Cir. 1985).

92. *Id.* at 758.

93. *Id.*

94. 811 F.2d 856 (5th Cir. 1987).

95. *Id.* at 861.

96. *Id.* at 861 n.8.

97. 811 F.2d at 862. In *Duran*, the district court's refusal to modify was held erroneous under either standard, *see supra* notes 91-93, whereas in *Ruiz*, the district court's refusal to modify was correct under either standard, *see supra* notes 94-96.

98. In *Ruiz*, the Fifth Circuit stated that "[c]ourts and commentators have asserted that the unique nature and demands of institutional reform litigation necessitate a more flexible approach to modification," *Ruiz*, 811 F.2d at 861, while in *Duran*, the Seventh Circuit referred to "decrees

Some commentators have endorsed the more liberal modification standard for institutional reform litigation as well.[99] One commentator analyzed the distinctive traits of institutional reform litigation and identified three characteristic features: the speculative and complex quality of relief, the role of the government as original defendant, and the effect of the litigation on nonparties.[100] That commentator argued that each of these characteristics militates for a more flexible approach to modification.[101]

Although the language of *Newman*, *Duran*, and *Ruiz* suggests that the standards for granting modification may be becoming more flexible, closer scrutiny of the cases reveals adherence to the strict *Swift—Stotts* standard. The *Duran* and *Ruiz* courts acknowledged the existence of a more flexible standard, but neither court applied the "new" standard because it would not have changed the outcome of either case.[102]

The more ambiguous opinion is *Newman v. Graddick*,[103] where the court cites *Carey* and indicates that a more flexible standard may be applicable to prison reform consent decrees.[104] The court discusses the flexible standard, but concludes only that the question is "whether conduct or conditions have changed that would justify modification."[105] The reference to changed conditions is very similar to the terminology used by the *Swift* Court, so *Newman* can be interpreted to comport with *Swift*. However, the *Newman* court's phrasing seems to temper or dilute the shrill language of *Swift*, which provided that "nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions" would justify modification.[106] Moreover, the ambiguity is exacerbated because the Eleventh Circuit does not apply either standard to the record in the case, but rather remands for consideration by the district court. Thus *Newman* sends mixed signals and cannot be

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supervising public institutions . . . ." *Duran*, 760 F.2d at 758.

99. *See, e.g.*, Jost, *supra* note 2, at 1146; Note, *supra* note 1, at 1039; *cf.* Steinberg, *supra* note 45, at 71 (neither the *Swift* standard nor lower court formulations are necessarily the appropriate standard; rather, courts should engage in *ad hoc* balancing test). *But see* Comment, *supra* note 45, at 677 (no consensus among commentators for modification under "freer hand" standard).

100. Note, *supra* note 1, at 1033-37.

101. *Id.* at 1033-39.

102. *See supra* note 97 and accompanying text.

103. 740 F.2d 1513 (11th Cir. 1984).

104. *See supra* note 89 and accompanying text.

105. 740 F.2d at 1520.

106. United States v. Swift, 286 U.S. 106, 119 (1932).

interpreted to establish a more flexible approach to modification.

More confusing yet is the Ninth Circuit's decision in *Washington v. Penwell*,[107] where state officials entered into a consent decree that required them to fund nine months of legal services for the inmates and to formulate plans for the provision of such legal services in the future.[108] When a dispute arose over these provisions, the district judge modified the decree to eliminate them, declared that the purpose of the consent decree had otherwise been met, and terminated the litigation.[109] The Ninth Circuit affirmed the modification,[110] explaining that the Constitution did not mandate the provision of legal services to the extent provided for in the consent decree.[111] The district judge applied a very liberal standard of modification, and the Ninth Circuit affirmed the decision. This case is an aberration that is irreconcilable with the others. Careful scrutiny of the other cases reveals the continued vitality of the *Swift* standard. Thus, while courts discuss a more relaxed standard, none has explicitly relied on that standard.[112]

D. *Distinctions in the Standards for Modification of Consent Decrees and Litigated Injunctions*

Up to this point, fully litigated injunctions and consent decrees have been treated as interchangeable, but a subsidiary issue is whether the modification standards for the two types of orders are the same. The courts have not provided a clear answer. In *Swift*, the Court stated that "[a] continuing decree of injunction directed to events to come is

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107. 700 F.2d 570 (9th Cir. 1983).

108. *Id.* at 572.

109. *Id.*

110. *Id.* at 574.

111. Consent decrees generally require the defendants to do more than the constitution mandates. *See supra* notes 20-21 and accompanying text. The court's conclusion that modification was warranted because the consent decree provisions in question were not constitutionally required is odd and has drastic implications for the continued vitality of consent decrees. The implications of this case are currently the focal point in Duran v. Carruthers, 678 F. Supp. 839, 851 (D.N.M. 1988). The district court recently denied a motion by the defendants to vacate major portions of the consent decree on the basis that its provisions were not constitutionally required. For authority, the defendants cited *Penwell*. In ruling against the defendants, the district court made a valiant effort to distinguish *Penwell*. *See Duran*, 678 F. Supp. at 851 n.23. The defendants filed notice of appeal on March 10, 1988. Prison officials are watching this case closely.

112. The difference between talk and action was recognized by Judge Hill in Ruiz v. Lynaugh, where he specifically lamented the panel's reluctance to adopt explicitly the flexible approach. He wrote, "I believe we should explicitly endorse the flexible approach for modification of instituitional reform consent decrees as a guide for district courts involved in on-going and future public law litigation." 811 F.2d 856, 863 (5th Cir. 1987) (Hill, J., concurring).

subject always to adaptation . . . . The result is all one whether the decree has been entered after litigation or by consent. In either event, a court does not abdicate its power to . . . modify its mandate."[113] This language clearly indicates that there is no distinction between consent decrees and litigated injunctions for purposes of modification. The water was muddied, however, in 1968 when the Court decided *United States v. United Shoe Machinery Corp.*[114] In *United Shoe*, the Court allowed modification of a fully litigated injunction and distinguished *Swift* on the basis that "the defendants [in *Swift*] sought relief not to achieve the purposes of the provisions of the decree but to escape their impact."[115] *United Shoe* seems to allow modification more freely than *Swift*, but the extent of the holding is uncertain. Although the Court did not explicitly limit its holding to litigated injunctions, some commentators have concluded that the law announced in *United Shoe* extends only to litigated injunctions.[116]

There is uncertainty whether a distinction exists in the standards for modifying consent decrees and litigated injunctions, and if a distinction does exist, whether it should render modification of consent decrees more or less difficult than modification of litigated injunctions.[117] *Swift* seems conclusive that no distinction exists; however, *United Shoe* provides some basis for concluding that the Supreme Court recognizes

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113. United States v. Swift & Co., 286 U.S. 106, 114 (1932) (citations omitted).

114. 391 U.S. 244 (1968). *See generally* Jost, *supra* note 2, at 1119; Steinberg, *supra* note 45, at 47-48; Note, *supra* note 1, at 1024-26.

115. 391 U.S. at 249.

116. *See, e.g.*, Note, *supra* note 1, at 1025 n.33.

117. One recent analysis of modification standards for litigated injunctions and consent decrees is provided by Professor Jost. *See* Jost, *supra* note 2. He distinguishes consent decrees from litigated injunctions and contends that courts should be more hesitant to modify consent decrees than litigated injunctions for the following reasons: (1) A consent decree is a contract and is, therefore, presumably the most efficient allocation of risk; (2) easy modification of consent decrees would frustrate the parties and, therefore, deter settlement; (3) strict modification standards compel the parties to bargain with each other, which is preferable to judicial modification because the parties have superior knowledge of the facts; and (4) it is more difficult to discern the original intent behind a consent decree than a litigated injunction, therefore, it is more difficult for the court to modify a consent decree to facilitate the original intent. *Id.* at 1124-30, 1142-45, 1162; *see also* Steinberg, *supra* note 45, at 65 & n.188. Although Professor Jost writes that consent decrees should be more difficult to modify, he points out that modification must still be available for consent decrees. Jost, *supra* note 2, at 1146-47, 1162. Otherwise, one danger of a judicial standard that makes modification significantly more difficult to establish for consent decrees than fully litigated orders would be to deter parties from settling their lawsuits. *See* Philadelphia Welfare Rights Org. v. Shapp, 602 F.2d 1114, 1120 (3d Cir. 1979), *cert. denied*, 444 U.S. 1026 (1980).

a distinction in modification standards.[118] While no circuit court has considered the question directly, some circuits have hinted at support for a distinction. One Third Circuit decision[119] and one Ninth Circuit decision[120] seemed to consider the question of whether the injunction was litigated or consensual to be a relevant factor in the modification analysis. Notwithstanding the fact that these courts agreed that the type of injunction is relevant, they disagreed on what impact the distinction should have. The Third Circuit hinted that a consent decree is more difficult to modify,[121] while the Ninth Circuit implied that a consent decree is easier to modify, at least as to those terms in the decree not constitutionally required.[122] However, the language from the Third

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118. One factor courts often cite in deciding whether modification is warranted is whether conditions have changed so much that the injunction is no longer serving its original purpose. *See generally* Jost, *supra* note 2, at 1142-48 (modification to effectuate the rights of the beneficiary as one form of flexibility). The relevance of this factor was first suggested in *Swift* where the Court stated that a court may modify an order "if satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong." United States v. Swift & Co., 286 U.S. 106, 114-15 (1932). Later, the Supreme Court interpreted *Swift* explicitly to establish the role of the injunction's purpose. In *United Shoe*, the Court stated: "Swift teaches that a decree may be changed upon an appropriate showing, and it holds that it may *not* be changed in the interests of the defendant if the purposes of the litigation as incorporated in the decree . . . have not been fully achieved." United States v. United Shoe Mach. Corp., 391 U.S. 244, 248 (1968). Many of the circuit courts have relied on this "purpose analysis" as one factor in deciding prison modification questions. *See, e.g.*, Ruiz v. Lynaugh, 811 F.2d 856, 861 n.8 (5th Cir. 1987) (per curiam); Newman v. Graddick, 740 F.2d 1513, 1520 (11th Cir. 1984); Nelson v. Collins, 659 F.2d 420, 423-24 (4th Cir. 1981).

This approach has one drawback. To determine whether the injunction is still serving the litigated purpose, the purpose must be identified. While litigated decrees have a clear purpose (for example, in *United Shoe*, the elimination of monopoly practices), consent decrees are just contracts between parties, which often do not have an identifiable purpose. *See* United States v. Armour & Co., 402 U.S. 673, 681-82 (1971); Washington v. Penwell, 700 F.2d 570, 575 (9th Cir. 1983). *See generally* Jost, *supra* note 2, at 1143-44. Thus, the courts' analyses of whether an injunction is still serving its purpose may be helpful for modifying litigated injunctions, but it creates confusion for modifying consent decrees. The point is not that the courts' reliance on the purpose of the injunction renders modification easier for one type of injunction or another, but only that the "purpose analysis" tends to reinforce distinctions between litigated injunctions and consent decrees.

119. *Shapp*, 602 F.2d at 1120.

120. *Penwell*, 700 F.2d 570; *see supra* notes 107-12 and accompanying text.

121. The court stated: "And where, as here, the defendants made a free, calculated and deliberate choice to submit to an agreed upon decree rather than seek a more favorable litigated judgment their burden under Rule 60(b) is *perhaps* even more formidable than had they litigated and lost." 602 F.2d at 1120 (emphasis added).

122. The Ninth Circuit affirmed a district court's modification of a consent decree where the trial judge had eliminated a provision requiring the funding of legal services for prison inmates on the grounds that it was not mandated by the Constitution. The court ruled that the prison officials who had consented to the provision had exceeded their authority, and thus implied that modification of a consent decree is easily available for terms not constitutionally required.

Circuit is only a hint,[123] and the Ninth Circuit decision is not explicit, so the law remains unclear.

E. *The Preferable Modification Standard for Litigated Injunctions and Consent Decrees*

The modification standard applied by the courts remains strict, and confusion surrounds the question of whether to distinguish litigated and consensual orders. What is the most desirable approach? The courts' adherence to the strict *Swift* modification standard for both types of injunctions is wise policy. In the case of litigated injunctions, the trial provides a full record of all the facts. Both parties have an opportunity to raise all their claims and defenses. After the court enters judgment, the parties have the opportunity for appellate review. Thus, both parties have access to all the facts and all the questions have been fully examined. The result of this careful effort should not be set aside short of a dramatic change in conditions—the situation accommodated in *Swift*.

With consent decrees, negotiations do not begin until discovery is well under way. Extensive discovery allows both parties access to all the facts. The parties are represented by counsel engaged in arms-length negotiations, and they enter the agreement voluntarily, with their eyes open. As with litigated injunctions, neither party must take any risks based on ignorance. The parties have a duty to anticipate reasonable future changes, and if either side makes what turns out to be a bad bargain, it should not be relieved simply because they did not predict the future accurately. Short of drastic change, the parties should assume the risk of their own misjudgments; they should be allowed relief only when they can meet the rigorous standard of *Swift*.

These policies are not affected because one of the litigants happens to be the state. The eleventh amendment prohibits lawsuits against a state directly, so these conditions suits are filed against the individual state officers in their official capacity.[124] Defendants have argued that an injunction entered against their predecessors cannot bind them.[125] This argument has been rejected by the courts,[126] and wisely so. Two drawbacks would arise from endorsing such a loophole. First, the de-

123. *See supra* note 121.

124. *See Penwell*, 700 F.2d at 573 n.3, 574 and cases cited therein.

125. *See, e.g.*, Newman v. Graddick, 740 F.2d 1513, 1517-18 (11th Cir. 1984); Duran v. Carruthers, 678 F. Supp. 839, 851 (D.N.M. 1988).

126. *See, e.g., Newman*, 740 F.2d at 1517-18.

fendants could easily avoid the court order by changing personnel. Second, this approach would create an incentive to change state officers, thereby undermining professionalism and continuity. Furthermore, as a policy matter, state officials should not be held to a lesser standard on their errors in judgment than private litigants. State officials are not under any special or particular disability that would militate for different treatment; they should bear the risk of their mistakes like any other party. Thus, the law does not treat state officials differently, and it should not. Standards for modification should not be readjusted because one of the parties is the state.

Finality in the terms of these prison injunctions is important for reasons unrelated to whether the injunction is agreed upon or litigated. The goal of these lawsuits is dissolution—to get the defendants in compliance with the law and the court out of the prison business. Progress towards this goal is undermined if modification is readily accessible, because if modification is always an option, the defendants can hardly avoid being less committed in their compliance efforts. For example, if the state legislature denies corrections officials funding to ease overcrowding, those officials will be less prone to insist on the funding and more prone to consider the alternative of seeking modification of the injunction. A strict modification standard forces both parties to prioritize their interests and choose their battles judiciously, without relying on the availability of modification. Moreover, forcing parties to shoulder the risk of their own misjudgments creates an incentive for the parties to be cautious, both in negotiating or litigating. The strict modification standard also keeps modification motions to a minimum, thus easing the burden on the courts. Finally, for intractable issues, there is always the option of the parties themselves agreeing to modify the injunction. If the defendant has a serious problem with a term in the injunction, it will often be a problem for the plaintiff as well. Even if that term is not a problem for the plaintiff, there may be another provision on which the plaintiff needs a compromise. For intractable situations, these private compromises are available solutions regardless of the legal standard for modification. This option of a private response indicates further that freer modification is not necessary. Actually, the strict modification standard promotes cooperation and compromise between the parties.

Accordingly, no distinction should be made between modification of litigated injunctions and consent decrees, not because a distinction is per se unwise, but because both types of injunction independently call

for application of the strict modification standard.

III. Defining the Dissolution Standard

A. *Background*

The term dissolution, as used in this article, refers to the court's action in dissolving the injunction. The impact of dissolution differs slightly for a consent decree and a litigated injunction. With a consent decree, dissolution ends the contract. No contract would exist without the court's approval;[127] once the court dissolves the decree, the contract is deemed performed and neither party has any further duties under it. The defendant retains the duty to comply with the law but has no duty to do more than the law requires.

A litigated injunction is more complex. As noted above, a litigated injunction can only compel the defendants to do the minimum required by the law,[128] that is, run a constitutional prison. Theoretically, dissolution of that injunction would have no impact because it imposes no additional duty: The defendant is always required to comply with the law. Thus, dissolution of a litigated injunction would be a pointless step if the injunction merely ordered the defendants to run a constitutional prison. But the injunctions that courts enter after litigation are actually more detailed. They do not merely order a prison to operate constitutionally; rather, the court selects a specific manner in which the prison can achieve constitutionality and orders the defendants to pursue that particular approach. Constitutionality can be achieved on any given point in a number of ways, but when a court enters an injunction after litigation, the defendant loses the choice and the court selects the method. Dissolution of such specific injunctions does have an impact because once it is dissolved, the defendants can choose their own approach to achieving constitutionality rather than having one imposed upon them.

On the other hand, courts entering litigated injunctions will sometimes allow the corrections officials to help define the terms of the injunction. A court faced with entering an injunction after prison conditions have been found unconstitutional may give the defendants an opportunity to submit a plan to cure the problem. This approach appeals to the courts because it undermines the defendants' potential

127. *See supra* note 18.

128. *See supra* note 21 and accompanying text.

claims of overintrusiveness[129] and makes it awkward for the defendants to complain about the content of the injunction. When the court takes this approach, the impact of dissolution on the defendant is reduced because the impact of the injunction was minimized. Because it was a litigated injunction, it only ordered the defendants to provide the constitutional minimum, and because the judge allowed the defendant to participate in defining the cure, the defendant had some input into the remedy.

Dissolution has another impact on the defendant as a practical matter. The injunction imposes an administrative burden on the defendants because the court supervision involves a workload in the form of responses to allegations of noncompliance, correspondence with the parties and the court, and other miscellaneous matters. Dissolution eliminates this workload. This impact of dissolution operates equally for consent decrees and litigated injunctions.

Accordingly, dissolution of either type of injunction leaves defendants with the duty to comply with the law and no more, and leaves to the defendants the choice of how to achieve that compliance. In addition, dissolution further relieves the administrative burden on the defendants.

Relinquishment of jurisdiction refers to the court's action in terminating its supervision over the prison and formally ending the litigation. The relationship between dissolution and relinquishment of jurisdiction has not been carefully analyzed. Courts have not distinguished the issues. If the questions are approached separately, it is clear that the question of whether the court should retain or relinquish jurisdiction is controlled by the question of whether the court has dissolved the injunction. If the injunction is dissolved, there is no point in the court retaining jurisdiction over the prison and the court should relinquish jurisdiction. If the injunction has not been dissolved, the court should obviously retain jurisdiction to monitor compliance. Thus, the real question is whether the court should dissolve the injunction, and there is no reason to address relinquishment of jurisdiction as a discrete issue.[130] Because courts have not distinguished the issues of dissolution

129. *See infra* note 133.

130. *Cf.* Anderson, *Release and Resumption of Jurisdiction Over Consent Decrees*, *supra* note 29. Professor Anderson considers the questions of dissolution and relinquishment of jurisdiction to be separate questions. *Id.* at 413. He does not analyze the standards for dissolution of injunctions. Rather, he assumes that the injunction has not been dissolved, and analyzes two questions: When should the court release jurisdiction? And if the court does release jurisdiction and noncompliance recurs, how can the court resume jurisdiction? Professor Anderson's assumed sce-

and relinquishment of jurisdiction, and because there is no reason to do so, this article treats these questions together.

Unlike modification, the question of when dissolution is appropriate has not received much attention. Few courts have considered the issue,[131] and commentators have not generally analyzed the dissolution and modification issues independently.[132] However, dissolution is a distinct issue because it raises concerns not implicated by modification. Specifically, the duration of the injunction and concomitant court supervision raises issues of federalism. Federal courts intervening into areas of state power, like state prison systems, operate under constitutional limits designed to minimize the intrusiveness of the remedy.[133] The potential for overintrusiveness flowing from excessive federal court supervision distinguishes dissolution from modification.[134]

Once an injunction is entered, either through consent or after litigation, courts routinely retain jurisdiction of the lawsuit to supervise the implementation phase.[135] The court retains jurisdiction for several purposes: Retention allows the court to consider remedial questions as they arise without new suits being filed; it allows the court to supervise compliance with the injunction generally; and it signals the parties that the court will continue to be involved—a signal with symbolic value.[136]

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nario—that dissolution of the injunction is not warranted but the court might nonetheless release jurisdiction to monitor compliance—is unlikely. If the standards for dissolution are not met, why would the court give up jurisdiction? The assumption makes some sense when the author provides his definition of release of jurisdiction. His definition is that such release does not really terminate jurisdiction or the litigation, but merely places the case on inactive status, *id.* at 413, a step that ends only the court's active supervision. *Id.* at 404. Thus, a situation could be imagined where the parties are not entitled to dissolution of the injunction, but the court nevertheless feels safe in limiting its active supervision. In contrast, in this article, the phrase "relinquish jurisdiction" does not mean put on inactive status or relinquish active monitoring; instead it means completely terminate supervision and formally end the litigation. With this definition of relinquishment, there is no point in analyzing relinquishment of jurisdiction separately from dissolution. If the injunction is not dissolved, the court should retain jurisdiction. If the injunction is dissolved, the court should terminate jurisdiction. The only real question is should the injunction be dissolved.

131. *See infra* notes 140-49 and accompanying text.

132. *See* Jost, *supra* note 2, at 1105 n.30; Steinberg, *supra* note 45, at 41-73. *But see* Special Project, *supra* note 1, at 817-21 (discussion of modification), 842-44 (separate discussion of dissolution).

133. *See, e.g.*, Rhodes v. Chapman, 452 U.S. 337 (1981); Bell v. Wolfish, 441 U.S. 520 (1979); Rizzo v. Goode, 423 U.S. 362 (1976); Procunier v. Martinez, 416 U.S. 396 (1974).

134. *See generally* Special Project, *supra* note 1, at 866-69. The author points out that the Supreme Court has never reversed a remedial scheme solely on the basis of constitutional overintrusiveness, but has expressed its concern in several cases. *Id.* at 868.

135. *Id.* at 816-17.

136. *Id.*; *see also* M. HARRIS & D. SPILLER, JR., AFTER DECISION: IMPLEMENTATION OF JUDICIAL DECREES IN CORRECTIONAL SETTINGS 17-20 (1977).

Jurisdiction is usually retained for an indefinite period,[137] and unless the decree has an expiration date written into its terms,[138] it remains in effect until it is dissolved. Thus, some action is required or the decree and court supervision will continue indefinitely. How do these lawsuits end? Some, of course, just lapse into a dormant state from lack of attention, but occasionally parties move to dissolve the injunction.[139] In these cases the courts must define when a particular piece of prison litigation should end.

B. *The Standard: Assessing the Risk of Future Noncompliance*

1. Case Law

The Supreme Court has never addressed the dissolution issue in the context of a prison conditions or an institutional reform case. The closest Supreme Court authority is *United States v. W. T. Grant Co.*,[140] a case in which the United States sought an injunction under the Clayton Act against an individual who held interlocking directorates in competing corporations. Prior to the issuance of the injunction, the individual resigned the relevant directorates. The question was whether the district court had the power to grant the injunction when the illegal conduct had been discontinued. The Court held that the district court did retain that power, notwithstanding that there was no "danger of recurrent violation." The Court stated that the relevant factors to consider were: the "bona fides of the expressed intent to comply, the effectiveness of the discontinuance and, . . . the character of the past violations."[141] *W.T. Grant* is analogous to prison reform cases in that the illegal conduct had been discontinued, and the question was the power of the court to enjoin potential illegality. *W.T. Grant* is dissimilar to prison reform cases in that the issue in *W.T. Grant* was, assuming no current violation, whether an injunction could be entered, whereas the issue in prison cases is, assuming no current violation, whether the in-

137. *See, e.g.*, Jones v. Wittenberg, 330 F. Supp. 707, 721 (N.D. Ohio 1971), *aff'd sub nom.* Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972) ("This Court will retain continuing jurisdiction over this action and the parties thereto . . . for a sufficient length of time . . . to make it reasonably certain that the changes of methods and practices required will not be abandoned . . . ."); *see generally* Special Project, *supra* note 1, at 842 & n.494.

138. *See* Steinberg, *supra* note 45, at 63-64 (expiration date can be negotiated and included in the terms of the consent decree).

139. *See, e.g.*, Kendrick v. Bland, 659 F. Supp. 1188 (W.D. Ky. 1987) (defendants moved for dissolution).

140. 345 U.S. 629 (1953).

141. *Id.* at 633.

junction must be dissolved. The Supreme Court's decision to allow an injunction when there was no current illegality indicates that the Court would not conclude that prison conditions injunctions must be dissolved simply because there is current compliance. Aside from this case, the only clue to the Court's attitude toward dissolution is its repeated emphasis on deference to state administrators.[142]

Several circuit courts, however, have confronted the specific question of when dissolution and relinquishment of jurisdiction are proper. In *Battle v. Anderson*,[143] the Tenth Circuit examined how long the supervision of the Oklahoma prison system should continue. The court stated that the goal of judicial intervention is the permanent achievement of remedial objectives and not total implementation of the changes required in the decree.[144] Thus, while concluding that the district court retained jurisdiction over the system, the court of appeals also recognized that there were limits to the jurisdiction: "These limits are defined by the purpose of the continuing jurisdiction—to assure that the court's intervention has achieved lasting institutional reform. Accordingly, the court may exercise continuing jurisdiction over the Oklahoma prison system to the extent necessary to assure that eighth amendment violations will not recur."[145]

The First Circuit reached a similar conclusion in *Lovell v. Brennan*.[146] In affirming the district court's denial of continued jurisdiction over prison suits, the court stated that in certain circumstances jurisdiction could be retained in order to monitor conditions at a prison, but only "if it found a likelihood that the constitutional rights of the plaintiffs would be violated in the near future."[147]

Similarly, in *Taylor v. Sterrett*, the Fifth Circuit concluded that if there is no evidence that the violations initially remedied are likely to recur, then retention of jurisdiction and continued monitoring by the district court exceed the court's authority and are error.[148] And the

142. *See, e.g.*, Turner v. Safely, 107 S. Ct. 2254, 2261-62 (1987); O'Lone v. Estate of Shabazz, 107 S. Ct. 2400, 2404-05 (1987); Whitley v. Albers, 475 U.S. 312, 322-26 (1986); Superintendent, Mass. Correctional Inst. v. Hill, 472 U.S. 445, 455-56 (1985); Rhodes v. Chapman, 452 U.S. 337, 352 (1981); Bell v. Wolfish, 441 U.S. 520, 531 (1979).

143. 708 F.2d 1523 (10th Cir. 1983), *cert. dismissed sub nom.* Meachum v. Battle, 465 U.S. 1014 (1984).

144. *Id.* at 1539 (quoting Special Project, *supra* note 1, at 842-43). In other words, if the goals are achieved without total implementation, the remaining changes are unnecessary.

145. *Id.*.

146. 728 F.2d 560 (1st Cir. 1984).

147. *Id.* at 564.

148. 600 F.2d 1135, 1141, 1145 (5th Cir. 1979). *See generally* Anderson, *Release and Re-*

Sixth Circuit affirmed a district court's decision to retain jurisdiction "for a sufficient length of time . . . to make it reasonably certain that the changes of methods and practices required will not be abandoned, forgotten, or neglected, but have become permanently established."[149]

These circuit court cases are consistent with *W. T. Grant*[150] in that they express a future-oriented dissolution standard.[151] This approach also is consistent with the theory of equitable relief, the purpose of which is not to punish, but to deter illegal conduct in the future.[152] If an injunction is no longer necessary to deter future noncompliance, it stands only as a punishment for past transgressions and should be dissolved. Alternatively, if the injunction is still deterring noncompliance, it should be continued.[153]

2. Relevant Factors in Assessing the Risk of Future Noncompliance

The future-oriented dissolution analysis is problematic because it involves prediction of the risk of future violations.[154] What evidence should courts look to in predicting that risk? Some factors relevant to the risk of future violations are more easily identified than others. As the Supreme Court noted, one index is "the bona fides of the expressed intent to comply."[155] Assuming the defendants articulate their intent to comply, how can the court assess the bona fides of that intent? Two indices are the defendant's track record with respect to compliance and its cooperative spirit, including good faith efforts to comply.[156] It is also possible, but extremely rare, for the defendant to replace correction officials who were responsible for prior misconduct.

A second factor mentioned by the Supreme Court is "the effective-

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sumption of Jurisdiction over Consent Decrees, *supra* note 29, at 409 n.32.

149. Jones v. Wittenberg, 330 F. Supp. 707, 721 (N.D. Ohio 1971), *aff'd sub nom.* Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972).

150. 345 U.S. 629; *see supra* notes 140-42 and accompanying text.

151. *See* Anderson, *Release and Resumption of Jurisdiction over Consent Decrees*, *supra* note 29, at 406 (articulating two-pronged test for release of jurisdiction that focuses, in part, on the likelihood that defendants will violate the decree in the future). *See generally id.* at 409-12.

152. Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944).

153. *See generally* Steinberg, *supra* note 45, at 60-64.

154. Of course, the difficulty of predicting the recurrence of violations will vary with the particular issues involved. If a prison builds a hospital wing to provide constitutional medical care, the facility will likely be there for some time. In contrast, it is very difficult to guage the likelihood of overcrowding because intake increases are often unpredictable.

155. *W.T. Grant Co.*, 345 U.S. at 633.

156. Anderson, *Release and Resumption of Jurisdiction over Consent Decrees*, *supra* note 29, at 411.

ness of the discontinuance."[157] The more common term for this factor is compliance. Substantial compliance is surely necessary for dissolution of an injunction. The more critical question is whether substantial compliance[158] is sufficient for dissolution of an injunction. The cases examined above indicate that mere compliance is not sufficient. Rather, there must be some basis for the court to conclude not just that there are no violations today, but also that there will be no violations tomorrow.[159] Only one case has suggested that mere compliance is sufficient for dissolution. In *Washington v. Penwell*,[160] the decree required *inter alia* that the defendant state officials fund legal services for inmates, provide paralegals and libraries, and develop plans for inmate access to the courts.[161] The district court judge found the defendants to be in substantial compliance with the paralegal and library provisions, modified the decree to eliminate the other requirements, terminated jurisdiction, and dismissed the action.[162] The Ninth Circuit affirmed the district court's decision, stating that "the finding that defendants had complied with the library and paralegal provisions of the decrees was not clearly erroneous. These provisions did not require further enforcement."[163] This language suggests that the district court's finding of compliance alone was enough to warrant dissolution. As noted above, *Penwell* is an aberration with respect to modification standards, and it has turned out to be an aberration on dissolution standards as well. Commentators have agreed with the majority view that compliance alone is not sufficient to warrant dissolution.[164]

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157. *W.T. Grant Co.*, 345 U.S. at 633.

158. Courts distinguish total compliance from substantial compliance; only substantial compliance is required for terminating a consent decree. *See, e.g.*, Washington v. Penwell, 700 F.2d 570, 572 (9th Cir. 1983) (consent decree terminated partly because defendants in substantial compliance with decree provisions concerning libraries and paralegals); *see also* Anderson, *Release and Resumption of Jurisdiction Over Consent Decrees*, *supra* note 29, at 406 (compliance as one prong of two-pronged test).

159. *See* Anderson, *Release and Resumption of Jurisdiction over Consent Decrees*, *supra* note 29, at 404 ("[T]he judge should release jurisdiction if the defendant has substantially complied with the decree, and if there is no reasonable likelihood that the defendant will violate the decree in the future."); *see also id.* at 406 (proposing same two-pronged test).

160. 700 F.2d 570 (9th Cir. 1983).

161. *Id.* at 572.

162. *Id.*

163. *Id.* at 575.

164. *See* Anderson, *Release and Resumption of Jurisdiction over Consent Decrees*, *supra* note 29, at 406 (two-pronged test for release of jurisdiction: substantial compliance and no risk of noncompliance in future); Jost, *supra* note 2, at 1151-52 (compliance is only a mitigating factor if other reasons to dissolve the injunction are present); Steinberg, *supra* note 45, at 66 (compliance alone is not sufficient, but compliance with two other factors—hardship on the enjoined party and

The final factor recognized by the Supreme Court is the character of past violations.[165] In the prison context, application of this factor presumably indicates that the more extensive and egregious the unconstitutional conditions of confinement, the more wary a court should be of concluding that there is no danger of future violations.[166]

In predicting the risk of recurrent noncompliance, district judges may also consider other factors that indicate that the changes are permanent or temporary. For example, they might look to proposed state budgets and prison appropriations,[167] legislative acts relating to the prisons, and prison policies in assessing how ingrained the changes are.[168]

One factor not mentioned in the cases that is relevant in predicting future violations is the educational impact of recent Supreme Court guidance in defining the constitutional prison.[169] As more cases are handed down in this young area, prison administrators are being educated in two ways. First, these cases make prison administrators and state legislators aware of minimum constitutional requirements. Second, the cases also show administrators what happens to a system when those minimums are not met—the local federal court will supervise the prison's administration. This increased guidance of the substantive law, coupled with the knowledge that failure to comply will result in continued federal court involvement, gives state officials both the ability and the incentive to avoid future violations.[170] Therefore, the educational impact of prison reform lawsuits may diminish the risk of future unconstitutionality, making dissolution more feasible.[171]

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rehabilitation—is sufficient to dissolve injunction).

165. *W.T. Grant Co.*, 345 U.S. at 633.

166. For example, if the prisoners are badly beaten and brutalized, a court should be cautious in predicting that brutality will not recur.

167. *See, e.g.*, Kendrick v. Bland, 659 F. Supp. 1188, 1196, 1198, 1200-01 (W.D. Ky. 1987).

168. *See generally id.*

169. *See supra* notes 140-42 and accompanying text.

170. It might be argued that this view is naive; that in other areas, like school desegregation, years of litigation have had little impact on recurring unconstitutionality. But prison reform is distinguishable from school desegregation in that constitutionality standards have been more clearly defined, and the defendants' incentive to comply is reinforced by the threat of individual damage suits. Individual suits are not a significant threat in school desegregation law.

171. In analyzing the propriety of dissolution, if we go beyond the limited focus on the likelihood of future violations, other factors become relevant. Professor Steinberg has identified two ways in which the public interest would be disserved by making dissolution readily available. *See* Steinberg, *supra* note 45, at 62. First, structural injunctions serve not only as a specific deterrent to future violations, but also as a general deterrent. Therefore, a stringent dissolution standard has a beneficial deterrent impact on prison systems other than those engaged in illegal conduct. *Id.*

C. *The Best Approach to Dissolution*

The current legal standard for dissolution of prison conditions injunctions requires the defendant to prove that it is currently in substantial compliance with the injunction and that there is no risk of recurring violations in the future. Thus, dissolution is not a question of the past (punishment), but of the present (compliance) and the future (risk of noncompliance). This formulation of the dissolution standard is sensible; the courts are wise to require both current compliance and evidence that the compliance will continue. Dissolving the injunction if the prison were not presently in compliance would render the litigation pointless. Likewise, dissolving the injunction if the evidence indicated noncompliance was likely to recur in the future would defeat the purpose of the litigation because it would require only temporary changes by the defendant. The courts' analyses of the risk of future noncompliance ensures that the purpose of the prison reform lawsuit—permanent change—is achieved.

When courts are assessing the risk of future noncompliance, there are several factors the courts consider. One factor which has received no attention but should be considered is the educational impact of prison reform litigation during the last twenty years. As noted above, state prison administrators and state legislators have been educated on the requirements of a constitutional prison.

Although the dissolution standard is sensible, and the few cases decided indicate that the courts are applying it conscientiously, courts may fall prey to an unarticulated reluctance to dissolve the injunctions.[172] This reluctance has three causes. First, the courts have no established tradition of dissolving these injunctions, and in a system based on precedent, a lack of experience can make a court wary. Second, the courts are aware that many states are struggling with budget

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Second, if dissolution is readily available, congestion will result as parties badger the courts with frequent motions to dissolve the injunctions. *Id.* These concerns cannot be accommodated by the future-oriented focus of the current dissolution standard. Whether the standard should be adjusted to accommodate such concerns is a more thorny question. These are speculative concerns. Even assuming they are deemed compelling, they are insufficient justification for continuing an injunction against a prison, or prison system, that has established no risk of future noncompliance. Such injunctions limit the methods prison administrators can use to achieve compliance with the law and also impose administrative burdens. *See supra* notes 127-30 and accompanying text.

172. Only six states have been released from the supervision of a court in a major conditions lawsuit: Alabama, Arkansas, Georgia, Kentucky, Oklahoma, and Utah. Telephone Survey by the Kentucky Cabinet for Corrections, Nov. 1986; *see also* Special Project, *supra* note 1, at 842; NATIONAL PRISON PROJECT, Number 13, Fall 1987, at 24 (listing the status of 80 prison suits currently pending in 47 states and the District of Columbia).

crunches, and corrections is an easy area to target for reduced spending. Thus, courts are reluctant to conclude that there is no risk of future noncompliance and relinquish their authority over the prison.[173] Third, the courts may be generally reluctant to commit to a prediction of the future when the alternative is merely to continue the status quo—to keep monitoring the parties' compliance with the injunction.

Although a court may be tempted to act with an excess of caution and continue the injunction, there are several reasons why courts should resist any intuitive sentiment against dissolution. If the dissolution standard is met, that is, there is current compliance and no risk of future noncompliance, there is no reason for the court to continue the injunction. At this point, the injunction serves no purpose and the federal court's involvement in the state's business is overintrusive and disrupts the balance of federalism. Moreover, dissolution is not irreparable. If the court dissolves the injunction and it turns out that the defendant is soon operating unconstitutionally, the plaintiffs can always present the issue again, either through a new lawsuit or through resumption of the old one.[174] Either way, the plaintiffs are not left unprotected once the injunction is dissolved. Finally, the defendants have an incentive to continue complying with the law independent of their quest for dissolution of the injunction. Once the injunction is dissolved, prisoners can file individual suits against the state system and get damages if their constitutional rights are violated. These damage actions remain available to prisoners after the injunction is dissolved and, therefore, create an incentive for the state to continue operating constitutionally. Thus, the courts should not be hesitant to grant dissolution if the standard is met.[175]

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173. When a court refuses to dissolve an injunction entered against correction officials because of suspicion that the state legislature will reduce spending on corrections and the prisons will sink into illegality, the court actually becomes the correction officials' ally in working towards adequate funding.

174. *See generally* Anderson, *Release and Resumption of Jurisdiction over Consent Decrees*, *supra*, note 29, at 413-16.

175. Courts recognize that it is best to end their involvement in the state prison systems promptly. *See, e.g.*, Finney v. Arkansas Bd. of Corrections, 505 F.2d 194, 216 (8th Cir. 1974) ("We recognize that the sooner the district court may discharge its jurisdiction of the case, the better it is for everyone."), *aff'd sub nom.* Hutto v. Finney, 439 U.S. 1122 (1979); *see also* Anderson, *Release and Resumption of Jurisdiction Over Consent Decrees supra*, note 29, at 409-11 (articulating three reasons why it is important for courts to confront and decide the issue of whether to release jurisdiction); Special Project, *supra* note 1, at 844 ("Although detailed substantive provisions offer considerable advantages for monitoring compliance and for administration, they restrict the defendants in ways that may prove unreasonable in the long run.").

D. *The Relationship between the Modification and Dissolution Standards*

The strict modification standard and the dissolution standard are a good combination. Dissolution is the ultimate goal of prison reform litigation because dissolution means that the corrections system is in compliance with federal law and there is no reason to doubt that compliance will continue. As noted above, dissolution restores the balance of federalism. It allows the state administrators to make their own choices on how to remain in compliance with the law, and it reduces the administrative burden on the defendants. In addition, the plaintiffs are not left unprotected by dissolution because they can reopen the lawsuit or file a new one.

Adopting a free, flexible modification standard would undermine the ultimate goal of dissolution. Planning toward dissolution would be impossible if the standards for compliance were always shifting in response to modifications. Moreover, if modification were always an option, it would too easily replace dissolution as the goal of the parties. A stringent modification standard is essential to moving the parties toward the goal of dissolution rather than postponing any conclusion through a potentially endless series of adjustments and modifications.

CONCLUSION

Courts resist the modification of structural injunctions in prison reform cases. While some courts discuss a more relaxed standard for modification, close analysis of the case law reveals continued reliance on the strict modification standard articulated by the Supreme Court in *Swift* and *Stotts*. The issue of whether consensual and litigated injunctions should be distinguished with respect to ease of modification is confused, and even courts that agree there should be some distinction cannot agree on its impact. The wisest course is for courts not to distinguish litigated and consensual injunctions but to review both types under the stringent *Swift* standard. Litigated and consensual injunctions both deserve the respect of finality. As for dissolution, courts generally agree on the legal standard and relevant factors. One factor which courts have overlooked is the educational impact of prison reform litigation over the last 20 years. But courts must guard against reluctance to dissolve prison reform injunctions. This reluctance is unwarranted if the dissolution standard is met.

The combination of a strict standard for modification and a future-oriented standard for dissolution should provide the necessary

institutional reform. Dissolution is the ultimate goal of prison reform litigation; the strict modification standard actually encourages progress toward this goal. Once the dissolution standard is met, that is, once compliance is achieved and there is no risk of falling out of compliance in the future, the federal court can dissolve the injunction and relinquish supervision of the prisons to state officials.